proceeding on the obligation. Therefore, if this Court decides that the execution of the bond in the *Erie case* precluded the taxpayer from recovering, the decision in the instant case must be in favor of the Government unless the form of the agreement constitutes a controlling distinction. We submit that it does not.

If the court below was correct in its view that the escrow deposit and accompanying agreement created a new liability, distinct from the tax assessment, the payment of that obligation was not barred by any statute of limitations. Therefore the petitioner can not recover as in the case of a tax erroneously collected.

In conclusion it may be noted that the findings do not show that payment was made under threat of distraint. (R. 12.) It is, therefore, possible to infer that the petitioner paid the tax voluntarily to secure the release of its deposit, protesting merely against the disallowance of a portion of its claim in abatement on its merits. Whatever the situation was, we contend that it can not now recover.

## II

SECTIONS 611 AND 612 OF THE REVENUE ACT OF 1928 SHOULD BE CONSTRUED TO PREVENT RECOVERY OF TAXES COLLECTED AFTER THE STATUTORY TIME FOR COLLECTION HAD EXPIRED, IF A CLAIM IN ABATEMENT WAS FILED AND COLLECTION STAYED

The Government contends that if the payment in June, 1926, was not in satisfaction of the contractual obligation arising out of the deposit in

escrow, but rather was a collection of the 1918 tax, then the facts of the instant case bring it within the terms of Section 611 of the Revenue Act of 1928, and that section is a complete defense to this suit.

Here assessments were made prior to June 2, 1924, and claims in abatement were filed within the statutory period for assessment and collection. The claims were disposed of in April, 1926.

This was subsequent to the deposit in escrow. If it be considered that the tax was paid by the deposit, then it was paid before the enactment of Section 1106 (a) of the Revenue Act of 1926 and the case will be controlled by the decision of this Court on that question in *Magee* v. *United States*, No. 65, October Term, 1930. But if the making of the deposit did not constitute payment of the tax, then the actual date of the payment being June 8, 1926, subsequent to the enactment of Section 1106 (a) of the Revenue Act of 1926, the case will be controlled by the decision of this Court in the case of *United States* v. *Wyman, Partridge & Company*, No. 416, October Term, 1930.

In the instant case the claim for refund, unlike those in all the other cases in the group, with the exception of *Boston Pressed Metal Company* v. *United States*, No. 337, was filed after the enactment of the Revenue Act of 1928. This makes inapplicable any argument that Section 611 applies only to cases where the claim for refund was filed after its enactment.

## CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*
CHARLES B. RUGG,
*Assistant Attorney General.*
CLAUDE R. BRANCH,
*Special Assistant to the Attorney General.*
GEORGE H. FOSTER,
BRADLEY B. GILMAN,
ERWIN N. GRISWOLD,
H. BRIAN HOLLAND,
*Attorneys.*

DECEMBER, 1930.

## APPENDIX

### STATUTES INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, so far as material, provides:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect

suits or proceedings begun at the time of the passage of this Act: * * *.

Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides:

> SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C., App., Title 26, Sec. 1249.)

Sections 607, 611, and 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provide:

> SEC. 607. *Effect of expiration of period of limitation against United States.*
>
> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Sup. III, Title 26, Sec. 2607.)
>
> SEC. 611. *Collections stayed by claim in abatement.*
>
> If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of

limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C., Sup. III, Title 26, Sec. 2611.)

SEC. 612. *Repeal of section 1106 (a) of 1926 Act.*

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C., Sup. III, Title 26, Sec. 2612.)

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